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February 28, 2000

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

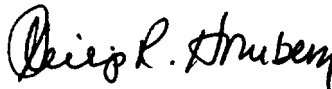
**Re: Reply Comments of National Basketball Association and
National Hockey League
in CS Docket No. 00-2**

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Reply Comments of the National Basketball Association and the National Hockey League in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,



Phillip R. Hochberg

Enclosures

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Before the
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Matter of:)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Sports Blackout Issues)

CS Docket No. 00-2

**REPLY COMMENTS OF
NATIONAL BASKETBALL ASSOCIATION
AND
NATIONAL HOCKEY LEAGUE**

The National Basketball Association ("NBA") and National Hockey League ("NHL") (sometimes the "the Leagues") hereby file the enclosed Reply Comments before the Federal Communications Commission in CS Docket No. 00-2, in response to the Notice of Proposed Rulemaking ("Notice"), issued on January 7, 2000, concerning the implementation of the Satellite Home Viewer Improvement Act ("SHVIA").

The NBA and NHL urge the Commission to adopt regulations consistent with their individual Comments filed on February 7. Moreover, they agree with the positions taken by other sports interests, including the National Football League, Office of the Commissioner of Baseball, and the Division 1-A Athletic Directors Association. In addition, the NBA and NHL support the statement of a non-sports entity, the Fox Entertainment Group, which recognized that the new satellite rules should mirror existing cable rules and concluded:

[T]he Commission should ensure that the new satellite sports blackout rule does not create loopholes or other exceptions that expand the limited privilege extended by the statutory license.¹

The Leagues, however, vigorously oppose positions taken by a number of commenting parties, specifically the satellite carriers.

A. The satellite carriers have totally failed to shoulder the burden of proof required by Congress in dealing with network stations.

In adopting new Section 339(b)(1)(B) dealing with sports blackouts on network² stations, Congress specifically called on the Commission to adopt Sports Blackout regulations (comparable to Section 76.67) “to the extent technically feasible and not economically prohibitive.” In the Joint Explanatory Statement which accompanied passage of the Act, Congress gave guidance on what would satisfy the statutory requirement. It said:

The burden of showing that conforming to rules similar to cable would be “economically prohibitive” is a heavy one. It would entail a very serious economic threat to the health of the carrier. Without that showing, the rules should be as similar as possible to that applicable to cable service.³

This burden is not met by just showing that it would be inconvenient or difficult or costly, but that the burden could put the carriers out of business. Nonetheless, the carriers paid little more than scant attention to responding.

¹ Fox Entertainment Group at 4.

² With regard to nationally distributed superstations, Congress did not offer the FCC any leeway. Section 339(b)(1)(A) simply directed the Commission to adopt the Sports Blackout Rule. See, e.g., NAB at 4, ALTV at 2.

³ (Emphasis added.) Joint Explanatory Statement at 145 Cong. Rec. at H11796 (November 9, 1999).

And the reason, of course, is obvious: There would be no real hardship on the satellite carriers to comply with the imposition of the Sports Blackout Rule. Both of the major carriers already black out sports events in particular areas of the country pursuant to their distribution agreements with regional Sports Networks. For example, in the Washington-Baltimore area, the satellite carriers carry the entire schedule of the Home Team Sports Regional Sports Network; outside of the Washington-Baltimore area, the carriers black out various NBA, NHL, and Major League Baseball games on the Home Team Sports Network. The carriers therefore are already providing, by their own volition, blackouts similar in nature to what the Commission is considering here. Obviously then, it is no accident that the Comments offered do not focus on accepting the burden placed by the Commission.

Instead, DirecTV's showing of a "very serious economic threat to the health of the carrier," for example, stated simply, *ex cathedra*, without any more evidence, that

the cost burdens of extraneous regulation should be minimized wherever possible. The Commission should therefore recognize the technical difficulties and economic burdens that applying the sports blackout rule to the retransmission of network signals would entail, and refrain from imposing any such rule on the emerging DBS industry.⁴

However, the "technical difficulties and economic burdens" that DirecTV claims are ones that it has already freely accepted by contract in its distribution of RSNs and of the NBA's League Pass and the NHL's Center Ice packages. In both cases, the Leagues require – and DirecTV has agreed – that certain games are to be blacked out in various geographic areas.⁵

⁴ DirecTV at 18-19.

⁵ See Attachment A.

EchoStar's sole concession to shouldering its burden of proof is even less than that of

DirecTV. EchoStar says:

As to sports blackout, the Commission should *not* at this point impose any sports blackout rules on satellite carriers, at least with respect to network stations (where, as the Commission notes, the cost is especially unjustified in light of the rare occurrences in which a sports team would be capable of invoking the rule).⁶

While the showing dealing with the “withering” C-band industry – with only 1.65 million subscribers⁷ – does not respond specifically to the network station provision in Section 339(b)(1)(b), it is the closest that the satellite industry came to shouldering its burden. Yet even that showing is unpersuasive. The SBCA complained about the industry not being economically able to invest the significant time and financial resources to develop the technologies for any deletions (apparently including Sports Blackout Rule deletions from network signals). Yet this “dying” industry is capable of paying \$55.5 million in satellite royalties in 1999 for the subsidized (by copyright owners) right to carry those signals.⁸ Regardless of the SBCA's poor-mouthing,

⁶ EchoStar at 10 (Footnote omitted.). Not only did EchoStar fail to make any showing, but in its partial sentence parenthetical justification, it mischaracterizes what the Commission said. The Commission noted that “blackouts may ... present technological and economic challenges,” hardly a conclusion that costs are “especially unjustified.” (Emphasis added.) Notice at Para. 26. It was the obligation of EchoStar to make the showing – which it, for some reason, chose not to do.

⁷ Which of course would be fifty per cent larger than the largest cable system in the country and comparable to the sixth largest cable MSO in the nation. Cable Television Developments, Winter 1999, at 13-14.

⁸ Report of Receipts, Licensing Division, Copyright Office, February 15, 2000.

the Commission must conclude that the protections of the Sports Blackout Rule will not imperil the health of the C-band industry.⁹

The SBCA's statement that

with respect to pay-per-view programs, the system is designed to accommodate a relatively limited number of orders spread out over time

is exactly the circumstance that the industry would find with Sports Blackout: a limited number of requests spread out over time. Moreover, the SBCA's analysis of the application of the Access Control Center or Geoloc to the problem¹⁰ appears to fit quite precisely into the framework of the Sports Blackout rule. As the SBCA points out, Fox Sports used the Geoloc program for this very purpose when it was available for C-band transmission.

B. None of the satellite commenting parties recognized the unique nature of the Sports Blackout Rule's protection: protection of the home gate

The purpose of the Commission's rule – the concept of which has been approved by Congress on four different occasions¹¹ – has been to recognize the importance of protecting

⁹ See, e.g., "50 Reasons Why Bigger is Better," Satellite Orbit, March 2000, at 14-21, which points out that

When it comes to C-band's future, don't let anyone fool you.... The big dish is here to stay. Since the first C-band satellite system was sold, it has provided entertainment and sports fanatics hours of TV enjoyment and years of satisfaction.

Ibid. The article points out that new C-band satellites are being launched with lifespans of 12 to 15 years and concludes – before listing more than four dozen justifications as to why C-band is more than viable – that "given the choice, there are [50]...reasons why C-band is better than small dish or cable TV." Id. at 16.

¹⁰ SBCA at 14-15. That the Geoloc cannot be used to substitute programming is irrelevant, certainly in the sports context. Substitution is not the *sine qua non* of protection.

¹¹ See NHL at 2-4; NBA at 3.

sports teams and their gates, not broadcasters and their stations. The protections of the Sports Blackout Rule, for example, do not involve every market and every station as network nonduplication and syndicated exclusivity do. Unlike network nonduplication and syndex, the Sports Blackout Rule involves, realistically, a limited number of markets on a limited number of dates. The protection under Section 76.67 -- which undoubtedly will be the template used by the Commission -- runs to local games (a) which are being televised over-the-air on a distant station and (b) which are not being televised over-the-air at the game site. It is only these games which are implicated by the Rule's protections.

The satellite carriers appear to confuse the protection afforded under the Sports Blackout Rule with the protections which may be required under network nonduplication and syndicated exclusivity. The carriers have an obvious reason for doing it: By creating a smokescreen of "thousands" of blackouts required, they talk about a problem bigger than the one that actually exists.

For example, in the Comments filed by the Satellite Broadcasting and Communications Association, the SBCA uses the Buena Vista 3 Movie Package as an example of the burdens on the C-band industry. The package contains 75 titles which might be licensed to stations in any of 211 U.S. television markets, creating, according to the SBCA, the potential of monitoring 63,000 dates from a single notice.¹² Likewise, TV Guide in attempting to exempt the C-band industry, stresses that it is the local broadcasters who are being protected.¹³ And for DirecTV at Page 16

¹² SBCA at 7. See also the deliberate combining of the limited Sports Blackout requirements with the "vast numbers" of syndicated exclusivity and network nonduplication deletions at SBCA at 11, 13, and 15.

¹³ TV Guide at 8-9.

to refer to “thousands of [sports] blackout requests on a daily basis”¹⁴ or to say that its own limiting proposals

are even more necessary with regard to the retransmission of network [sports] signals ... given the vast number of network stations in the United States¹⁵

is either a misunderstanding of the Rule or a deliberate attempt to confuse the issue. The two different aspects of program deletion -- syndicated exclusivity and network nonduplication, on the one hand, and Sports Blackout, on the other -- are comparable neither in objective nor scope.¹⁶

The objective of the Sports Blackout Rule is to protect against the importation of distant signals carrying the telecast of a game in which a team plays. But it is limited in application. As an example of the limited nature, consider that on the date on which these comments are being filed (February 28, 2000), exactly two games in either league in the entire nation are being televised over-the-air by the away team, but not by the home team: Dallas Mavericks at Boston Celtics and Houston Rockets at Los Angeles Clippers. These are the only NBA or NHL games which would be subject to deletions.¹⁷

The problem alleged to exist just is not there.

C. The satellite industry’s proposals for changes in the application of the Sports Blackout Rule to satellite are inappropriate

(1) The events covered and the notice period should be the same as with cable

¹⁴ DirecTV at 16.

¹⁵ DirecTV at 19.

¹⁶ Contrast the misinterpretation of the various satellite carriers with the correct interpretation offered by the NCTA at 2.

¹⁷ Even if every game scheduled for this night in both leagues was affected, it would involve a grand total of nine blackouts nationwide.

Given the limited number of blackouts which will be required and given the history of 25 years of cable regulation, the Commission should adopt the procedural aspects of Section 76.67.

DirecTV asks the Commission to impose a 60-day advance notice period prior to the beginning of the season;¹⁸ EchoStar concurs, in a footnote.¹⁹ DirecTV then wants 30 days notice for “events not regularly scheduled” and 10 working days notice for any revisions; EchoStar is silent on both of these points. According to DirecTV, these lead times are necessary, since “satellite operators may be faced with thousands of blackout requests on a daily basis.”²⁰ Finally, DirecTV seeks a 12-month phase-in period.²¹

DirecTV and EchoStar know that for the Commission to require a 60-day advance notice prior to the season would mean no protection whatsoever. Indeed, this may be the rationale behind seeking such early notice. Even while telecasting contracts may be in place for the season, telecasting schedules rarely, if ever, are set two months before the beginning of play. And while games are not frequently rescheduled by either the NBA or NHL, there are occasions where telecast schedules are changed. The 10-day period offered by DirecTV often will not meet those deadlines. Finally, again as DirecTV must know, using a 30-day advance notice period for “events not regularly scheduled” will absolutely preclude any protection for post-season games. Not only are the schedules not known, but the teams and match-ups participating generally are

¹⁸ DirecTV at 16-17.

¹⁹ See EchoStar at 10, footnote 12.

²⁰ DirecTV at 16.

²¹ DirecTV at 19.

not even known, as DirecTV is well aware. Indeed, even a 10-day period would preclude post-season protection.

Ostensibly the reasons for requiring these notice periods are the complicated mechanisms necessary in facing “thousands of blackout requests on a daily basis.” Not only are the requests likely to be in the handfuls – rather than thousands²² – but the “complex” rationale offered by DirecTV seems a little less than complex.²³ These “complex” procedures (to use DirecTV’s term) include (a) notifying DirecTV of the game and the zip codes affected, (b) DirecTV notifying its scheduling department, (c) “checking again for accuracy,” and (d) “manually triggering” the blackout; quite simply, these “complex” procedures just do not seem to require 10 – much less 30 or 60 – days.

Indeed the changes that are made in telecasting schedules by RSNs and the Leagues now are routinely met by the carriers. Literally only hours of advance notice is needed for DirecTV and EchoStar to perform blackouts necessitated by these changes.

Finally, DirecTV has sought a one-year phase-in period once the rules are adopted. The Leagues object. Section 339(b)(2) requires that the regulations become effective no more than a year after enactment; it says nothing about a phase-in period which could create no protection for two full years after the passage of the legislation.

(2) No exceptions should be granted similar to the small system exemption

DirecTV urges that the Commission grant some sort of exemption if the Sports Blackout Rule would apply to less than five percent of the television households in the relevant DMA.

²² See text at supra note 17.

²³ DirecTV at 16.

Reliance on the DMA standard once again manifests DirecTV's failure to focus on the sports – as opposed to the television station – issue. DirecTV has skillfully attempted to use the largest area possible, suggesting that five percent is a de minimus number, without regard to its application to the Sports Blackout Rule. In the New York DMA, for example, DirecTV would not have to delete a distant sports-carrying station until 375,000(!) homes would be affected by the blackout. It remains to be seen when a level that high would be reached given that not every DBS or C-band subscriber would be offered distant signals carrying NBA and NHL games.

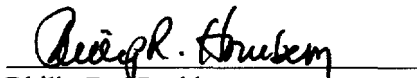
The small system exemption was designed to give relief to the Mom-and-Pop cable operator; certainly the satellite carrier here is not in the same situation. At most, the rule should be applicable only when a carrier itself has less than 1,000 subscribers, analogous to Section 76.67(f).

CONCLUSION

For the reasons stated above, the National Basketball Association and the National Hockey League urge adoption of regulations consistent with the positions taken.

Respectfully Submitted,

NATIONAL BASKETBALL ASSOCIATION
NATIONAL HOCKEY LEAGUE



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BROADCAST NEWS

THE LATEST SCOOP ON YOUR 18-INCH DISH. BY JAY HYLSKY

Hurry Up and Wait

DIRECTV makes it easier to get local channels, but there's a catch.

In our cover story last month, we explored the brave new world of dish options, among them the eagerly awaited local-into-local option, which will allow dish owners in major cities access to their local network channels through DIRECTV. Shortly after our special report went to press, DIRECTV simplified the local-into-local setup.

As we reported, DIRECTV planned to transmit network TV stations from New York and Los Angeles via its primary satellite location and use a secondary satellite positioned for additional local network TV transmissions. Under that plan, dish owners outside New York and Los Angeles would have to purchase a new 18x24-inch elliptical dish to receive their local TV stations. Now DIRECTV plans to use its primary satellites to transmit local network TV stations to subscribers living in and near big cities.

DIRECTV has not announced pricing for local network TV satellite service or which cities will beam from the primary satellite location. Pricing is expected to be about \$10 per month. In addition to New York and Los Angeles, expect the following cities to be on the list: Chicago, Philadelphia, San Francisco, Boston, Washington, Dallas, Detroit, Atlanta, Houston, Seattle, Cleveland, Minneapolis, Tampa, Miami, Phoenix, Denver, Pittsburgh and Sacramento.

Satellite delivery of local-into-local does require passage of satellite TV legislation. A joint House-Senate Congressional conference committee has been meeting to reform the Satellite



In DIRECTV's future: news anchors like D.C.'s Maureen Bunyan.

Home Viewers Act (SHVA) to allow DIRECTV to transmit local TV stations only to subscribers in a specific TV station's local market.

Another prerequisite for DIRECTV local-into-local service is obtaining satellite broadcasting rights from the networks. In September, DIRECTV cleared one hurdle in that process when they announced an agreement with Fox to allow the service to transmit 22 Fox-owned local TV stations once enabling legislation is passed. Fourteen of Fox's 22 TV stations are in top 20 U.S. TV markets. DIRECTV will continue to negotiate with ABC, CBS and NBC for local-into-local satellite broadcasting rights.

ATTACHMENT A The Listings... **DIRECTV**

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Dish Spotlights

November Dish Spotlights..... 38, 56, 68, 74, 80, 104, 110, 134, 152, 158, 164, 170, 182, 194, 206.

Para Todos Debuts

Here's another update to our October cover story. DIRECTV announced that starting October 15, it would offer the Para Todos package of Spanish-language channels in Miami, Houston and San Francisco. DIRECTV planned to use a secondary satellite located at 110 degrees west for this package. Instead, they are using a secondary satellite located at 119 degrees west. You'll still need an 18x24-inch elliptical dish as well as a Para Todos-enabled satellite receiver

made by Hughes Network System to get this service.

DIRECTV expects to roll out the service nationwide over the next six months. Para Todos provides movies, sports, news, religious,

educational, children's and pay-per-view. Among the channels offered are Univision, Discovery en Espanol, Fox Sports World Espanol, Galavision, Gems, MTVs, Cine Latino, EWTN, TV Chile and CNN en Espanol. The service has two options. Opcion Especial provides 14 Spanish-language and 24 English-language channels for \$19.99 per month. Opcion Extra Especial provides up to 21 Spanish-language and 77 English-language channels for \$31.99 a month. Both options include seven digital CD-quality audio channels which air Spanish-language music, including Boleros, Tejano and Tropical. ■



Para Todos offers Discovery en Espanol.

DTH DIRECT TO HOME CHANNEL NOTES

NBA League Pass (chs. 721-733) tips off on November 2. A daily schedule appears under "Sports Packages" next to each day's pay-per-view listings. A subscription to the package of out-of-market NBA basketball games costs \$169. Blackout restrictions apply. Tune to channel 214 or call (800) GET-SPORTS (438-7767) to order. In related news, DIRECTV now has exclusive satellite TV distribution rights for the NBA League Pass through the 2001-2002 season. **NBA.com TV** (ch. 720) starts transmitting on November 2.

The new channel will provide real-time statistics, scores and news from the NBA's Internet site at www.nba.com. NBA.com TV will be available at no extra charge to all NBA League Pass and DIRECTV Total Choice Gold and Platinum subscribers.

► Listings for **NHL Center Ice** (chs. 730-740) appear this month in the blue-tabbed Sports section under Ice Hockey. In December, they will be listed with the daily sports package schedules.